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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 211

SOUTH EAST NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–20) *sub nom. United States* v. *One 1957 Lincoln Premiere* is reported at 265 F. 2d. 734.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959. The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may challenge the constitutionality of the forfeiture provisions of 49 U.S.C. 781

et seq. on the ground that it could not have found out about the narcotics reputation of the purchaser of the car it had financed, where it failed to check with the narcotics bureau concerning the purchaser and where the issue was not raised in the lower courts.

STATUTES INVOLVED

49 U.S.C. 781 provides in pertinent part:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the Dis-

trict of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

* * * * * *

49 U.S.C. 782 provides in pertinent part:

> Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: * * *

STATEMENT

On October 15, 1957, in the United States District Court for the Northern District of Illinois, the United States filed a libel against One 1957 "Lincoln Premiere", Motor No. 57WA-7757L, pursuant to 49 U.S.C. 781 and 782, *supra*, pp. 2–3, on the ground that the vehicle had been employed to transport contraband heroin unlawfully (R. 4–6).[1] Petitioner, as claimant, answered the libel asserting that it was the actual owner of the seized vehicle under a conditional sales agreement with one Melvin Harris; and that after due inquiry prior to entering said agreement it did not know, nor could it have had reason to know, that Melvin Harris would utilize the vehicle in an illegal manner (R. 9–10).

At the hearing on the libel it was shown that a narcotics user, who named Harris as his source,

[1] "R." designates the government's appendix in the Court of Appeals. "App." designates petitioner's appendix in that court.

telephoned Harris on June 26, 1957, and arranged to purchase narcotics from him at 11:00 p.m. Police officers followed Harris between 10:30 and 11:00 p.m. and saw him enter the subject Lincoln automobile. After losing him in traffic, the officers proceeded to the rendezvous point and, as they approached, saw the Lincoln pull over to the curb. Harris thereupon got out and stood on the sidewalk adjacent to the automobile. He was placed under arrest, searched and found to possess heroin (Pet. 17–18; R. 40–44, 47–48).

Judge Perry granted the claimant's motion for judgment (R. 57–58), finding that the government had failed to establish probable cause for the libel. The rationale of the decision was that the evidence submitted by the United States in support of the seizure was circumstantial and insufficient when balanced against the claim of an innocent third party whose "innocence is wholly or in part due to the failure of the government to provide adequate warning * * * that the purchaser of the automobile is under suspicion of narcotics law violations" (R. 58–62, 61).

The Court of Appeals unanimously reversed, finding that the evidence of probable cause "is so clear and convincing" that, even assuming *arguendo* that a greater burden of establishing probable cause is placed upon the government where the claimant is innocent, that burden was amply met in this case (Pet. 20).

ARGUMENT

Petitioner does not here challenge the decision of the Court of Appeals that the evidence establishes

probable cause for the libel. It tenders for the first time in this Court the argument that the forfeiture provisions of 49 U.S.C. 781–782, as applied in this case, are unconstitutional. Petitioner contends that to libel an automobile owned under a conditional sales contract by a completely innocent claimant who ran a full credit check on the purchaser and could not, whatever its efforts, obtain adequate information concerning his past narcotics record, due to limitations put upon such disclosures by the United States, is to take petitioner's property without due process of law. It asks this Court to re-examine and overrule *Goldsmith-Grant Co.* v. *United States*, 254 U.S. 505, where, despite the conceded innocence of the claimant vendor, forfeiture of an automobile in which non-tax-paid liquor had been concealed was sustained under R.S. 3450.

1. While we do not believe that petitioner can properly raise the constitutional issue for the first time in this Court, the contention is in any event wholly unsupported. The cases are undeviating in holding that innocence of a claimant-intervenor is irrelevant to a forfeiture proceeding under 49 U.S.C. 781 *et seq.* The single question is whether the government has established probable cause.[2] See, *e.g.*, *Associates Investment Company* v. *United States*, 220 F. 2d 885, 887 (C.A. 5); *United States* v. *Andrade*, 181 F. 2d 42, 46

[2] There are only two exceptions provided for by the statute. They recognize innocence of the owner as a defense where the vehicle, vessel or aircraft is used as a common carrier or where the user of the vessel, vehicle or aircraft "acquired possession thereof in violation of the criminal laws of the United States or of any State".

(C.A. 9); *United States* v. *Gramling*, 180 F. 2d 498, 501 (C.A. 5); *United States* v. *One 1941 Plymouth Tudor Sedan*, 153 F. 2d 19 (C.A. 10); *United States* v. *One 1955 Ford Convertible*, 137 F. Supp. 830 (E.D. Pa.); *United States* v. *One 1952 Buick Special Riviera Automobile*, 136 F. Supp. 253 (D. Minn.); *United States* v. *One Oldsmobile Sedan*, 118 F. Supp. 450, 452 (E.D. La.); *United States* v. *One 1950 Chrysler Sedan New Yorker*, 117 F. Supp. 222 (W.D. Pa.).

The *Goldsmith-Grant* decision, moreover, has been reaffirmed by this Court. In *Van Oster* v. *Kansas*, 272 U.S. 465, 468, in sustaining the constitutionality of a state forfeiture statute, the Court relied upon that decision for the proposition that:

> It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.

And most recently the Court cited the case as authority for "a legal remedy sanctioned by the long history of Anglo-American law." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 444.

2. In any event, the issue posited by petitioner is not raised by this case. The contention is based on petitioner's claim that it could not have found out about Harris' prior narcotics involvements since there is no adequate information service set up by the government which lending institutions may utilize for that purpose, and the government is reluctant to

give out any such information at all. The record reveals, however, that petitioner made no attempt to check on Harris with the Bureau of Narcotics (R. 52; App. 9). In fact, as agent Newey testified, the Chicago office of the Bureau allocates over two hours each day to provide information to reputable financial institutions and informs inquirers whether individuals inquired about are mentioned in its files (R. 52; App. 7). The question here therefore is not whether the forfeiture statute is applicable to a claimant who did all it could to safeguard its investment, and was deprived of pertinent information by the government, but whether it is applicable to a claimant who failed to make a thorough investigation. For its failure in this regard, petitioner's application for administrative remission of forfeiture was denied. It cannot be granted such relief in a judicial proceeding. See, *e.g.*, *United States* v. *One 1941 Plymouth Tudor Sedan*, 153 F. 2d 19 (C.A. 10).

Although petitioner's contention that it is difficult to obtain information from the Bureau of Narcotics is supported by the findings of the district judge,[3] those findings, prepared by petitioner

[3] Finding of Fact No. 14 states (R. 60):

"That the great number of financial institutions in the Chicago area which finance the sales of automobiles and the short hours alloted by the Federal Narcotics Bureau for giving information as to suspected persons to those financial institutions make it almost impossible for those institutions to find out any information concerning prospective automobile buyers in regard to their status with the narcotics bureau. Furthermore the only information which is ever divulged by the bureau is that the person is under suspicion, and even that information is not always given to the financing institution."

See also Conclusion of Law No. 4 (R. 61).

at the direction of Judge Perry and thereafter approved by the Judge, were never challenged by the United States Attorney, who had no reason to do so. The district judge had found that the government failed to establish probable cause. Proceeding upon the proper assumption that probable cause was the only issue in the case and that the evidence did support a finding of probable cause, the position of the government on appeal was that the innocence or good faith of the claimant was immaterial. Moreover, in the court below petitioner made good faith an issue only insofar as it claimed that its existence placed a greater burden of proof of probable cause upon the government. The Court of Appeals, reversing the District Court, found that the evidence established probable cause. It thus had no occasion to deal with the question whether information could be obtained from the Narcotics Bureau.

In basing its argument of unconstitutionality on the findings of the district judge on the nonavailability of information, petitioner is not only raising an issue never raised below but is also basing it on facts which the government until now has never had reason to challenge or contradict. Against this background the issue is not properly before this Court. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 484, n. 2.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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